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No. 94-1696

In The

Supreme Court of the United States

October Term, 1994

MAUREEN HANSEN, et al.,

Petitioners,

v.

WESTERVILLE CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS OFFICER TIBURZIO, OFFICER T. SMITH, OFFICER R. BAILEY AND OFFICER P. ROSS

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Respondents Tiburzio, Smith, Bailey and Ross respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit is unpublished and is included in the

appendix to petitioner's Petition at A-1. The opinion of the United States Court of Appeals for the Sixth Circuit is unpublished and is included in the appendix to petitioners' Petition at page A-2. The opinion and order of the United States District Court for the Southern District of Ohio, Eastern Division is unpublished and is included in the appendix to petitioners' Petition at page A-25.

STATEMENT OF THE CASE

Petitioners commenced this action on July 17, 1989 under 42 U.S.C. § 1983 and state law. There are two (2) broad categories of Defendants in this case. The first category includes Westerville City School officials and school board members (hereinafter referred to as "Board Respondents"), and the second consisting of these Respondents, Westerville Police Officers Richard Tiburzio, Ted Smith, Randall Bailey and Don Ross (hereinafter "Police Respondents"). The Petitioners asserted claims of deprivation of constitutional rights under the First, Fourth and Fourteenth Amendments and state law claims of false arrest, infliction of emotional distress, malicious prosecution, and assault and battery, (R.1: Complaint para's 1, 22, 24, 25, 27, 32, 35, 37).

On June 22, 1992 the Police Respondents filed a Motion for Summary Judgment (R.44: Motion) based upon sovereign immunity, qualified immunity, probable cause, and advice of counsel. On October 28, 1992 Petitioners filed their Memorandum Contra to the Police Respondents' Motion (R.50: Response). Thereafter, on November 6, 1992, the Police Respondents filed their

Reply to Plaintiffs' Memorandum Contra Defendants' Motion for Summary Judgment (R.55: Reply). On January 28, 1993 the District Court rendered its Opinion and Order (R.65: Memorandum, Opinion and Order; Petition at A-25) granting the Police Respondents' Motion for Summary Judgment on all of Petitioners' claims on the basis of sovereign immunity, probable cause and qualified immunity. On February 24, 1993 Petitioners filed a Notice of Appeal (R.71: Notice of Appeal) and on March 17, 1993 Petitioners filed an Amended Notice of Appeal (R.73: Amended Notice of Appeal).

On November 7, 1994 the United States Court of Appeals for the Sixth Circuit issued its decision reversing the District Court as to one claim against Respondent Tiburzio and affirming the District Court as to all other claims against the Police Respondents (Petition at A-2). On January 19, 1995 the United States Court of Appeals for the Sixth Circuit denied a petition for rehearing and a petition for rehearing en banc (Petition at A-1).

The facts of this case which relate to the Police Respondents have been summarized by the District Court on pages 1-5 of its Memorandum, Opinion and Order (Petition at A-25) as follows:

> Plaintiffs' claims against the Police Defendants arise from two separate incidents. The first occurred on October 24, 1988 at a Westerville School Board meeting. The second happened on October 29, 1988 at the corner of Schrock Road in Westerville.

A

The Westerville School Board held a meeting on October 24, 1988. The Board planned to discuss at this meeting a proposed school levy tax increase that was on the ballot of an upcoming local election. The plaintiffs, who were against the levy, attended the meeting. The Board hired defendant Tiburzio to be at the meeting to prevent a breach of peace between the pro- and anti-levy forces.

A local television station recorded the meeting, and a copy of the video tape has been submitted as a joint exhibit. The Court has viewed the tape in its entirety.

Plaintiffs Huffman, Rood, Hansen and Waggoner each attempted to speak during the meeting. Defendant Don Miller, the Board president, ruled that the plaintiffs were out of order on each occasion.

Huffman was the first plaintiff to seek to address the board at the October 24 meeting. Defendant Miller ruled him out of order. Huffman, however, continued to attempt to address the Board. Defendant Tiburzio then approached Huffman. He asked him to leave several times. Huffman voluntarily left with Tiburzio after several requests. Tiburzio informed Huffman as the two approached the chamber doors that he was placing him under arrest for disrupting a lawful meeting.

Plaintiff Rood next approached the podium and tried to address the Board. Board Defendant Miller ruled him out of order. Rood, however, persisted in speaking to the board in a loud voice.

Defendant Tiburzio then approached Rood and asked him to leave the chambers. Rood refused because he wanted to read something to the Board. Tiburzio then attempted to lead Rood out of the chambers, holding his arm. Rood repeatedly tried to pull away from Tiburzio. Rood shouted to Tiburzio, "get your paws off me" more than once. Tiburzio told Rood that he was under arrest for disturbing a lawful meeting as he led him away.

Police Defendants Bailey and Smith, both Westerville police officers, then arrived and joined Tiburzio. Tiburzio told Bailey and Smith that he had placed plaintiff Rood under arrest. Rood continued to try to walk away. Bailey and Smith attempted to hold Rood by his arms. Rood tried to pull away from them, thrashing his arms. In doing so, Rood bruised Bailey's left arm. Westerville Police Sergeant Jeffrey Jones then arrived on the scene. He started to handcuff Rood. Rood then ceased struggling. Sergeant Jones directed, upon Rood's request, that Bailey and Smith release Rood. Plaintiffs Huffman and Rood then went to the Westerville Police station without being handcuffed.

Back in chambers, plaintiffs Hansen, Ward, Waggoner, Sue Bresee, McIntyre and Bean all approached the podium. The Board ruled them out of order. Hansen and Waggoner, however, continued to try to address the Board. Tiburzio eventually approached the plaintiffs and asked them to leave the chambers. The plaintiffs complied and left without incident.

At one point, some unidentified police officers accidently knocked down plaintiff Brown.

Brown was not injured and acknowledges that the contact was not intentional.

B

The second incident occurred at the corner of State Street and Schrock Road in Westerville on October 29, 1988. Plaintiffs Carl Huffman and Jerry Bresee, as well as several unidentified persons, were at this location demonstrating against the tax levy.

Police Defendant Ross, a Westerville police officer, was on duty that day. Shortly after Ross reported for duty, Dispatcher Ande Pritchard issued a dispatch on a complaint that several individuals were creating a disturbance at the corner of Schrock and State Street by making obscene gestures and provoking remarks at passersby. The dispatch indicated that two members of Citizens Against Tax Waste, Pete Huffman and Gordon Rood, were possibly involved. Ross responded to the dispatch.

Police Defendant Ross arrived at the scene and approached the demonstrators. As Ross approached the group, he had his PR-24 baton in his right hand. Ross held his baton because he was concerned for his safety. His concern was based on his knowledge that Peter Huffman and Gordon Rood had recently been arrested and that several officers were required to effect the arrest.

Once he had approached the group, Ross asked to speak to Huffman and Rood. He also advised Carl Huffman and Jerry Bresee about the complaint he had received. Ross remained at the scene for another five to ten minutes. He

observed no activity to substantiate a disorderly conduct charge, and therefore left. The demonstrators continued their demonstration after Ross left. (footnotes omitted)

SUMMARY OF ARGUMENT

For the sake of clarity, the claims against the Police Respondents shall be addressed as three (3) separate incidents: (1) those claims against Respondent Ross alleging assault and battery against Petitioners Jerry Bresee and Carl Huffman; (2) those claims against Respondents Bailey and Smith alleging assault and battery against Petitioner Gordon Rood; and (3) those claims against Respondent Tiburzio alleging, *inter alia*, assault, false arrest and conspiracy against Petitioners Gordon Rood and Carl Huffman. Although the Court of Appeals makes reference to claims which had been brought against the City of Westerville, Ohio, those claims were voluntarily dismissed by Petitioners (R.54: Notice/Stipulation) and are not at issue here.

Although Petitioners seek review of the entire decision of the Court of Appeals, they make no mention of the claims against Respondent Ross and only briefly mention the claims against Respondents Bailey and Smith and present no argument that the decision of the Court of Appeals was in error as to any of these Respondents. Respondents submit that the decision of the Court of Appeals as to these Respondents was correct in law and fact.

Petitioners seek review of the decision as to Respondent Tiburzio by first drawing grossly improper inferences from facts in the record and then contending that these inferences also infer the existence of a conspiracy claiming that the Court of Appeals and the District Court failed to make all inferences in their favor thereby depriving them of their right to trial by jury.

Respondents submit that, after construing all proper inferences in favor of Petitioners, they still have not established the necessary elements of an actionable conspiracy and the decision of the Court of Appeals affirming summary judgment on behalf of Respondents was proper in law and fact.

With respect to Petitioners' claim that they were deprived of their Seventh Amendment right to a jury trial, Petitioners did not raise this issue below and, accordingly, it should not be considered by this Court. Furthermore, the law is well-settled that summary judgment does not violate a constitutional right to a jury trial. Therefore, review of this issue is unwarranted.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT ON BEHALF OF RESPONDENT ROSS.

The only claim against Respondent Ross is an alleged assault and battery on Petitioners J. Bresee and C. Huffman based upon the fact that he held a nightstick in his hand upon approaching these Respondents after having

been dispatched to their location on a complaint of a disturbance. No arrests were made, and when the officer did not observe anything improper, he left.

Citing to *Smith v. John Deere Co.*, 83 Ohio App. 3d 398, 406, 614 N.E. 2d 1148, 1154 (Franklin Co. 1993), the Court of Appeals noted that tortious assault in Ohio requires a willful threat or attempt to harm which reasonably places another in fear of harmful contact, coupled with a definitive act by one with the apparent ability to do the harm. As stated by the Court of Appeals, "[n]o reasonable trier of fact could find that the holding of a nightstick constituted an assault." (Petition at page A-9). Petitioners have not argued otherwise in their petition nor have they pointed to any inferences which would imply an actual threat or an accompanying definitive act as required to support a claim of an assault.

Further, Petitioners have not argued nor have they pointed to any inferences which would imply that Respondent Ross acted maliciously, recklessly, or in bad faith so as to defeat his immunity from liability under Ohio law. See Ohio Rev. Code § 2744.03(A)(6).

Respondents submit that the Petition to review the judgment of the Court of Appeals as to Respondent Ross should be denied.

II. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT ON BEHALF OF RESPONDENTS BAILEY AND SMITH.

The claims against Respondents Bailey and Smith involve the degree of force used by these officers in

effectuating the arrest of Petitioner Gordon Rood being asserted as claims of assault and battery under Ohio law and also raised under 42 U.S.C. § 1983 as a violation of Mr. Rood's Fourth Amendment right to be free of unreasonable seizures.

Noting that Petitioner Rood failed to offer any evidence to show that the officers acted maliciously, recklessly, or in bad faith, and that Rood himself admitted that he was a struggling arrestee, the Court of Appeals concluded that the officers were immune from liability on the state law claims by reason of O.R.C. § 2744.03(A)(6). (Petition at A9-10).

The Court of Appeals analyzed the federal excessive force claim under the "reasonableness" standard enunciated in *Graham v. Connor*, 490 U.S. 386 (1989) and held that "[n]o reasonable juror could find, under the circumstances presented here, that an arresting officer acted unreasonably by pulling an admittedly struggling suspect's arms behind his back and pushing him against a wall." (Petition at A-12).

The only mention in the Petition of Respondents Bailey and Smith is contained in one paragraph on page 6. Petitioners present no argument that the decision of the Court of Appeals in affirming summary judgment on behalf of these Respondents was in error, nor do they allege any factual inferences which were not accorded to Petitioner Rood.

Respondents submit that Petitioners have presented no basis to review the judgment of the Court of Appeals as to Respondents Bailey and Smith and that the Petition in this regard should therefore be denied.

III. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT ON BEHALF OF RESPONDENT TIBURZIO.

Petitioners have asserted a variety of claims against Respondent Tiburzio, under both state and federal law, in the nature of excessive force, false arrest, and conspiracy.

A. EXCESSIVE FORCE

The claims of excessive force against officer Tiburzio were discussed in conjunction with these same claims against officers Bailey and Smith since all of these claims arise from the same operative facts. Again, Petitioners have not argued that the decision of the Court of Appeals was in error nor have they pointed to any inferences of fact that were not drawn in their favor. Petitioners have presented no basis to review the decision of the Court of Appeals in this regard.

B. FALSE ARREST

As to the false arrest and malicious prosecution claims of Petitioners Rood and Huffman, the Court noted that under Ohio law the existence of a reasonable basis to believe that a crime has been committed is sufficient to defeat claims of malicious prosecution and false arrest, citing to *McFinley v. Bethesda Oak Hosp.*, 79 Ohio App. 3d 613, 607 N.E. 2d 936 (Hamilton Co. 1992); *State v. McCrone*, 63 Ohio App. 3d 831, 580 N.E. 2d 468 (Lorain Co. 1989); *Melanowski v. Judy*, 102 Ohio St. 153, 131 N.E. 360 (1921). (Petition at A-10).

Having reviewed the videotape which captured the events in question at the October 24 School Board meeting, the Court of Appeals noted that the conduct of Petitioners Rood and Huffman "unquestionably 'interfere[d] with the due conduct of [the] meeting' [such that] the existence of probable cause to arrest and prosecute both men for disturbing a meeting is beyond dispute." (Petition at A-11).

The Court of Appeals also concluded, as a matter of law, that probable cause existed to arrest and prosecute Petitioner Rood for resisting arrest as a result of Rood's conduct. (Petition at A-11).

Petitioners have not argued that this decision by the Court of Appeals is in error, nor do they assert that the Court of Appeals failed to draw any inferences in their favor as to these claims. Respondents submit that Petitioners have, therefore, waived these claims and the decision of the court below should not be disturbed.

C. CONSPIRACY

The gravamen of the Petition is the unsupported assertion that a conspiracy existed between Respondent Tiburzio and Respondents Husarik and Miller to violate the constitutional rights of Petitioners.

The District Court originally dismissed this claim finding "that the complaint does not fairly plead a conspiracy claim. More importantly, however, plaintiffs have adduced nothing more than unsupported innuendoes and conclusory allegations with respect to their conspiracy claim. The Police Defendants are entitled to summary

judgment in connection with plaintiffs' claim of civil conspiracy." (Petition at A-47).

Indeed, the three (3) claims for relief set forth in Petitioners' Complaint (R.1: Complaint) state simply:

> 35. Said acts by Defendants constitute violations of 42 United States Code Section 1983, and rights protected by the First, Fourth and Fourteenth Amendments to the United States Constitution.
>
> 37. Said acts by Defendants Don W. Miller, the Board, the Board members, Ernest A. Husarik and R. Tiburzio constitute false arrest and malicious prosecution under the law of Ohio as to Plaintiffs Gordon Rood and Carl Huffman.
>
> 39. Said acts by Defendants R. Tiburzio, T. Smith, R. Bailey, P. Ross and John Doe constitute assault and battery under the laws of Ohio.

As to "said acts" that are incorporated into these three (3) claims for relief, the Complaint simply alleges individual acts by individual Respondents with no allegation of fact as to a meeting of minds to obtain a single conspiratorial objective other than the conclusory allegation of paragraph 12 of the Complaint that the Board of Education, its members "and others" (?) worked in concert. *Moore v. City of Paducah*, 890 F.2d 831, 834 (6th Cir. 1989).

Even after discovery, Petitioners have been able to offer nothing more than the unsupported innuendoes and conclusory allegations of their counsel to support a conspiracy claim. As noted by the Court of Appeals in its decision (Petition at A-16):

> A complaint alleging a civil rights conspiracy must be supported by specific facts showing the "existence and scope of the alleged conspiracy." *Slotnick v. Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978). Nothing in the record of the case at bar supports a claim that the police conspired in any way to deprive the plaintiffs of their constitutional rights. Summary judgment was proper as to the police defendants and the City of Westerville on the claim of civil conspiracy.

Petitioners did not meet their burden under F.R. 56(e) of adducing significant probative evidence to support the claim of conspiracy [*Collins v. Walden*, 613 F.Supp. 1306, 1317 (D.C. Ga. 1985)] and instead rely upon the imagination of their counsel to create a conspiracy; but, as stated by the court in *Holderman v. Consolidated Rail Corp.*, 649 F.Supp. 1188, 1196 (N.D. Ind. 1986), a party may not "merely cry 'conspiracy' and throw itself on the mercy of the jury" nor avoid summary judgment by hopeful reliance on "snippets" of deposition testimony.

No Petitioner has provided a factual basis for a conspiracy between any Board Respondent and any Police Respondent, nor is their support for such a theory in the deposition testimony of any Respondent. The only support comes from the speculation of Petitioners' counsel with his imagined Lamont Cranston ability to know what evil lurks in the hearts of men. But, as stated by the court in *Love v. King*, 784 F.2d 708, 711 (5th Cir. 1986), "such inferences must be 'within the range of reasonable probability.' When the necessary inference is so tenuous that it rests merely upon speculation and conjecture, it is the duty of the court to withdraw the case from the jury."

As an example of the misstated deposition testimony and improper inferences from which Petitioners attempt to create a conspiracy where none existed, Petitioners first claim "that the Westerville Board of Education (acting primarily by and through Board President Don Martin and Superintendent Ernest Husarik) and the Westerville Police Department (acting primarily by and through officer Tiburzio) conspired to deprive the Petitioners of rights guaranteed under the First and Fourth Amendment to the United States Constitution." (Petition at 10). This statement conveniently ignores the fact that Petitioners voluntarily dismissed the City of Westerville from this litigation (R.54: Notice/Stipulation), and the Westerville Police Department was never named as a party.

Petitioners accuse Respondent Tiburzio of "alter[ing] the facts at his deposition to reflect a scenario that was consistent with that of the Respondent School Board." (Petition at 14, fn. 14), which ignores the fact that the sole deposition of Tiburzio was prior to the deposition of any school board member.

The "altered facts" imagined by Petitioners involve Respondent Tiburzio's deposition testimony that when he spoke with Dr. Husarik to find out what his function as a special duty officer at school board meetings would be, he first testified that he was told " . . . to make sure that there were no problems between the proponents, or the people that were for a school levy, and those against a school levy. And that was it." Later in the same deposition he testified, "*I believed* that if there were any problems, they would let me know, and nothing was ever said as to how or what." (Emphasis added.) (Petition at 13, fn.

14.) The fact that the officer made an assumption beyond what he was actually told hardly constitutes altering the facts, nor does it even imply a conspiracy.

Petitioners further attempt to allude to a conspiracy by claiming that Dr. Husarik testified that he did not meet with Respondent Tiburzio before the school board meeting while Tiburzio testified that they did meet.[1]

What Petitioners do not tell this Court is that Dr. Husarik testified that he did not meet with officer Tiburzio prior to the October 24, 1988 Board Meeting (R.45, Ex.2: Husarik at 8) and Tiburzio also testified that he did not meet with Dr. Husarik prior to the October 24 meeting, but only prior to the first time he worked special duty at the meeting in mid-September. (R.*: Tiburzio Depo at 61, 73-75).

Petitioners also find evidence of a conspiracy between the school board and the police in the fact that both Husarik and Tiburzio used an identical term, i.e. "remove" in describing what Tiburzio did with Petitioner Rood when he disrupted the meeting. (Petition at 15, fn. 16). How flimsy is Petitioners case when they argue that the Court of Appeals failed to draw an inference of a conspiracy in their favor from the fact that the Respondents all speak the English language!

In defining a civil conspiracy, the Sixth Circuit Court of Appeals held:

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[1] Even if this misstatement of testimony were true, it would directly contradict Petitioners slanderous assertion that officer Tiburzio altered his testimony to be consistent with that of the school board.

> "A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. . . . All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant." *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985).

While the fact that certain of the Petitioners may have been removed from the October 24, 1988 school board meeting may be termed an overt act, Petitioners have presented no evidence whatsoever to support any of the other elements necessary to prove a conspiracy between the Board Respondents and the Police Respondents.

There is no evidence of a single plan between the police and the school board. There is no evidence that the police shared a general conspiratorial objective with the school board.

There is no evidence of any meeting or conversation between anyone on the school board and anyone in the police department other than one brief conversation between Dr. Husarik and officer Tiburzio on or about September 12, 1988 in which Tiburzio inquired as to his duties and was advised that he was to maintain order.

Prior to this brief meeting, there was no contact between Tiburzio and anyone on the school board. Tiburzio had simply signed up to work a special duty job and was advised by his supervisor that he was to work in plain clothes and that the job consisted of maintaining peace and order.

Prior to the October 24, 1988 board meeting, officer Tiburzio did not know any of the Petitioners other than Mr. Rood to whom he had been introduced once years before; nor had he ever met any of the Board Respondents other than his one brief conversation with Dr. Husarik on September 12, 1988.

If a conspiracy existed (and there is no evidence to support such a claim), it certainly did not involve officer Tiburzio.

There was no single plan or general conspiratorial objective known by officer Tiburzio to prevent opponents of the tax levy from speaking because there was an essentially equal number of pro-levy and anti-levy speakers.

There was no single plan or general conspiratorial objective known by officer Tiburzio to prevent members of CATW from speaking because some members of CATW did speak and Tiburzio did not even know who was in that group.

There was no single plan or general conspiratorial objective known to officer Tiburzio to prevent the leaders of CATW or even certain specific people from speaking because Tiburzio did not know who any of the alleged leaders were and did not know any of the individuals removed from the meeting prior to that time other than Gordon Rood.

Quite simply, there is no evidence whatsoever to support the existence of the necessary general conspiratorial objective necessary for a claim of conspiracy involving officer Tiburzio.

Further, there is no evidence whatsoever that there was an agreement involving officer Tiburzio to perform an unlawful act. The arrest of Petitioners Rood and Huffman was *not* unlawful.

The incident in question was captured on videotape which was reviewed by the Court of Appeals which stated: "Our review of the videotape of the meeting persuades us that the existence of *probable cause* to arrest and prosecute both men for disturbing a meeting *is beyond dispute.*" (Petition at A-11, emphasis added.)

Further, upon a petition for rehearing en banc, all active judges of that court had an opportunity to review the videotape but they declined to disturb the decision of the original panel.

Petitioners attempt to argue that there was no probable cause for these arrests because officer Tiburzio exercised no independent judgment and simply followed instructions from Dr. Husarik. (Petition at 23-25.) This again is a gross misstatement of the facts in evidence.

Officer Tiburzio testified that no one told him to arrest Rood or Huffman and that that decision was solely his own. (R.*: Tiburzio Depo at 62). Someone from the school board may have motioned to the officer when the board was no longer able to control the meeting, but the decision to arrest was made by officer Tiburzio when first Huffman and then Rood refused to desist and leave the podium when the officer requested that they do so. In the case of the individuals who did desist and leave, the officer decided that no arrests were warranted.

Even if there were evidence that a conspiracy existed between two or more members of the school board, there is no evidence that officer Tiburzio, or any other Police Respondent, shared the "general conspiratorial objective" of intentionally disrupting Petitioners' First Amendment rights. Indeed, there is no evidence that warrants even an inference of unlawful motive in officer Tiburzio carrying out what may reasonably be viewed as routine law enforcement activity. *See Hobson v. Wilson*, 737 F.2d 1, 52-53 (D.C. Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S. Ct. 1843, 85 L.Ed. 2d 142 (1985).

Further, as to a claim of civil conspiracy brought pursuant to 42 U.S.C. § 1983, officer Tiburzio is entitled to the defense of qualified immunity. *See Hampton v. Hanrahan*, 600 F.2d 600, 634-635 (7th Cir. 1979), *cert. denied in part, granted in part and rev'd on other grounds*, 466 U.S. 754 (1980). It has already been established that officer Tiburzio had ample probable cause for his actions. Further, while it may have been well established law at the time of the incident in question that members of the public had a right to attend a public school board meeting [*See Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167,176 (1976)], it was also well established that government may place limitations on the time, place and manner or access to such forums. *See Perry Educational Ass'n v. Perry Local Educations' Ass'n*, 460 U.S. 37, 45-46 (1983).

In light of existing case law in Ohio upholding the right of a village council to eject a disruptive individual from council chambers, it cannot be said that officer Tiburzio violated clearly established law in removing the

disruptive Petitioners from the school board meeting. In *Kalk v. Woodmere* the court stated:

> The evidence presented to the trial court . . . clearly showed that appellant was in fact detained, touched and ushered out of the meeting. Our review of the record, however, shows that this ejectment did not rise to the level of constitutional violation of appellant's liberty. As stated above, the council had the right to have appellant removed from the meeting since he was creating a disturbance. 27 Ohio App. 3d 145, 149 (1985).

Finally, the actions of officer Tiburzio in effecting the arrest of Petitioners Rood and Huffman and in ejecting other Petitioners from the podium must be reviewed under the Fourth Amendment's reasonableness standard.

Although normally cited, as it was by the Court below, in reviewing instances of alleged excessive force, the decision of this Court in *Graham v. Connor*, 490 U.S. 386 (1989) discusses the standard to be applied in instances alleging a violation of the Fourth Amendment's prohibition against unreasonable seizures of the person and, although Petitioners claim that there was a violation of their First Amendment rights at the October 24, 1988 school board meeting, the operative act of officer Tiburzio was a "seizure" as would be governed under the Fourth Amendment.

As stated by the Court in *Graham*:

> The 'reasonableness' of a particular [seizure] must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . . The calculus

> of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving . . . . *Id.* at 396-97 (citations omitted).

In the instant action, officer Tiburzio was working a special duty assignment at a school board meeting with the assigned duty of simply keeping order, which is essentially the duty of a police officer in any event.

As shown in the videotape of the October 24, 1988 meeting, the meeting proceeded in an orderly, one might even say "uneventful," fashion for the first one hour and 26 minutes. Then bedlam erupted. Just taking the factual scenario set forth in the Petition, the following events confronted officer Tiburzio over the next *fifteen minutes*:

1. Respondent Huffman creates a disturbance, is ruled out of order, but refuses to leave the podium necessitating action by Tiburzio. Huffman continues to refuse to desist and eventually is led from the room and placed under arrest.

2. No sooner does Tiburzio get Huffman into the hallway than Petitioner Rood begins shouting, is ruled out of order, but refuses to desist. Tiburzio reenters the room to speak to Rood who refuses to desist and pulls away from the officer after being placed under arrest. Rood and Tiburzio eventually proceed to the hallway where Tiburzio advises two other officers who have just arrived that Rood and Huffman are under arrest.

3. A struggle ensues between Rood and the two officers at the same time as a large

group of people exit the meeting room placing Tiburzio in fear of further confrontations in the hallway.

4. No sooner is order restored in the hallway than Petitioner Hansen approaches the podium, is ruled out of order, but refuses to desist necessitating officer Tiburzio's return to the podium. Fortunately, Hansen did desist when requested to do so by Tiburzio.

There can be no doubt that officer Tiburzio was forced to make split-second judgments in a situation that was tense, uncertain and rapidly evolving. Viewing the actions of officer Tiburzio from the perspective of a reasonable officer on the scene it certainly cannot be said that any of his actions were unreasonable under the circumstances.

Respondents submit that the decision of the Court of Appeals in upholding the District Court's dismissal of Petitioners' conspiracy claim was correct in law and fact and should not be overturned on appeal. Petitioners have presented absolutely no facts to substantiate, even by inference, the existence or scope of a conspiracy between the Police Respondents and the Board Respondents, nor have they presented any facts, even by inference, of an unlawful act by the Police Respondents.

IV. THIS CASE PRESENTS NO QUESTION OF VIOLATION OF PETITIONERS' RIGHT TO A JURY TRIAL

Petitioners also insist that this case presents the question whether "the Court of Appeals" deprived Petitioners of their Seventh Amendment rights when it did not allow

a jury to consider the case. (Petition at 28.) In their Petition, Petitioners specifically state that their grievance on this point is with the Court of Appeals for the Sixth Circuit. (Petition at 29.) Petitioners have failed to present an issue that merits review.

A. PETITIONER FAILED TO RAISE THE ISSUE BELOW

First, the district court (and not the Court of Appeals for the Sixth Circuit) granted summary judgment in favor of Respondents and thereby precluded Petitioners from presenting their case at a jury trial on the merits. Petitioners did not raise to the appellate court, and the appellate court did not pass on, any assertion that Petitioners somehow had been deprived of a right to a jury trial, strongly militating against review of the issue by this Court. (*See Patrick v. Burgett*, 486 U.S. 94, 99 n.5 (1988); *City of Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989)). Despite Petitioners' lengthy argument, Respondents can not comprehend how the Court of Appeals for the Sixth Circuit deprived Petitioners of a jury trial that had been obviated, without subsequent complaint for deprivation of their constitutional rights, in the district court.

B. THE LAW IS WELL SETTLED THAT SUMMARY JUDGMENT DOES NOT VIOLATE CONSTITUTIONAL RIGHTS

Second, Petitioners cite no authority and Petitioners have no authority for the proposition that a grant of summary judgment (or, in the case here of the Court of

Appeals for the Sixth Circuit, affirmance of a lower court's grant of summary judgment) violates a constitutional right to jury trial. To the contrary, it is well settled that when summary judgment has been properly granted, no jury trial issue arises under the Seventh Amendment to the United States Constitution. *See Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440, 1447 (9th Cir. 1987); *Itel Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253, 1261 (11th Cir. 1983); *Barrett v. Independent Order of Foresters*, 625 F.2d 73, 75 (5th Cir. 1980); *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 (9th Cir. 1974); *United States v. Strangland*, 242 F.2d 843, 848 (7th Cir. 1957). Accordingly, Petitioners should not be granted review of this case on the basis that they were deprived of a jury trial. Little purpose would be served by this Court entertaining review of a matter of well-settled law on which the federal appellate courts (as well as the state courts and federal district courts) are in agreement.

This Court recently touched upon the very jury-trial issue raised here by Petitioner in *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986):

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex, 477 U.S. at 327.

As the *Celotex* Court recognized, a party's right to have genuine issues of material fact tried by a jury is not

violated by summary judgment. Petitioners have no constitutional right to present claims lacking any factual basis to a jury.

CONCLUSION

Petitioners have failed to show any conflict between the decision of the Court of Appeals for the Sixth Circuit and prior decisions of this Court or of any other federal court. Petitioners have failed to show any other basis for this Court to hear this case. The decision of the Court of Appeals for the Sixth Circuit is consistent with applicable law and does not warrant review on any grounds. Respondents respectfully request that Petitioners' Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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